

Abstract

The Convention on the Elimination of All Forms of Discrimination against Women has significantly impacted laws and jurisprudence on gender equality across the globe. Through a variety of procedures, states are implementing the principles of CEDAW into their own structures and making it operative at the ground level. This paper reviews these principles and provides an overview of state obligation to the treaty, and how it can be woven into national laws and policies in order to have a practical impact.

Introduction

I will examine CEDAW as a normative framework – its principles, procedures and monitoring mechanisms for promotion of State obligation – and then give a broad overview of the status of treaty law at the domestic level. I will conclude with some thoughts on the extra-legal strategies necessary for making CEDAW operative at the ground level.

Overview of principles to CEDAW

CEDAW came into force in 1981 as the first international human rights treaty and principal legal instrument to systematically and substantively address the needs of women. CEDAW legitimises women's claims for rights and equality, and is a positive legal framework that can be used to define norms for constitutional guarantees of women's human rights, to interpret laws, to mandate proactive, pro-women policies and to dismantle discrimination. CEDAW's uniqueness lies in its mandate for the achievement of substantive equality for women, which requires not only formal legal equality but also equality of results in real terms. By recognising that discrimination is socially constructed and that laws, policies and practices can unintentionally have the effect of discriminating against women, the Convention sets the pace for a dynamic, proactive approach to women's advancement. It is no longer possible to say that there is no discrimination against women if laws and policies do not overtly discriminate against women. Under the Convention, neutrality has no legitimacy. Positive actions are required of the State to promote and protect the rights of women.

CEDAW has a near universal mandate with 185 ratifications to date.¹ Such an international mandate is a strong counter

to the claim that equality between women and men should be made subject to culture and tradition. Non-discrimination is now a principle of international customary law.

The Committee on the Elimination of Discrimination against Women (CEDAW Committee), the treaty body that oversees States parties' compliance with the Convention, can mandate but not directly enforce such compliance – implementation of Committee's directives is dependent on national governments and political will. The existence of a positive legal framework for women's rights does not automatically confer rights on women. It does, however, legitimise women's claims for rights and makes possible women's transformation from passive beneficiaries to active claimants. It creates the space for women's agency. These gains made on paper at the international level set the stage for the real work: the implementation of CEDAW and other human rights instruments at the national level.

The key principles of CEDAW are substantive equality; non-discrimination and State obligation. *Substantive equality* differs from formal equality in that it mandates States to ensure: Equality of opportunity through law, policy, programmes and institutional arrangements; equality of access by (a) eliminating all obstacles that prevent access to the opportunities as well as (b) institution of positive measures/enabling conditions, including temporary special measures, to level the playing field between men and women; and through equality of results that entitles women to outcomes and social goods (education, employment etc) on an equal basis with men.

In thus defining substantive equality, CEDAW recognises the embedded nature

of discrimination, acknowledging necessity for differential treatment of men and women which is enabling and not protectionist. In designing remedial programmes, States must target women experiencing intersectional discrimination whose access to opportunities is especially limited by the multiple barriers they face. A key indicator of progress is improvement in the circumstances of such women.

The results-oriented nature of substantive equality is reflected in the CEDAW Convention's Article 2, which requires states "to ensure... the practical realisation" of the equality principle. To give a concrete example, a company may claim that it is giving equal treatment to men and women in instituting a procedure in which consideration for promotions factors in the amount of overtime done by employees, regardless of whether those employees are male or female. While this may look fair on the surface, it does not take into account that married women or women with children may not be able to do much overtime work since they typically bear the responsibility of domestic work, which is generally not shared equally between men and women. Therefore, unless domestic work and childcare are also equally divided between men and women, thereby enabling women to work overtime and get promoted, this is an unequal stipulation.

The second principle of CEDAW is *non-discrimination*, which takes into account structural discrimination – social, economic or cultural conditions that disadvantage a particular group in society. These background conditions are created historically through past discrimination, which in turn, has become entrenched in institutions. Laws, policies and practices can unintentionally have the effect of discriminating against

women. Discrimination operates in private and/or public spheres, including, for example, domestic violence and the undervaluing of domestic labour. Discrimination can be direct (different treatment leading to non-recognition of human rights of women or preventing women from exercising their human rights) or it can be indirect (same treatment preventing women from exercising their human rights in the private and public spheres). Once entrenched, these past practices of discrimination often become masked as part of the neutral baseline of these institutions. Due to its invisibility, its pervasiveness and its firm hold on the structures governing economic, social and cultural life, this form of discrimination is particularly difficult to remedy.

Article 1 defines discrimination as: “any *distinction, exclusion or restriction* made on the basis of sex which has the *effect or purpose of impairing or nullifying the recognition, enjoyment or exercise* by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms *in the political, economic, social, cultural, civil or any other field*” (emphasis added). The CEDAW Convention provides us with a framework holistic enough to recognise multiple forms of discrimination and to make a distinction between immediate relief aimed at ameliorating the conditions of women and long term measures that will elevate the position of women in society. It introduces the concept of corrective measures to overcome the effect of past discrimination that leaves women handicapped vis-a-vis the men. For example, if a development initiative is offered to women on the same footing as the men, according to the principle of equal rights or equal opportunity, it might still turn out that men benefit more than women, because men

have more experience, confidence or simply because the environment is male dominated and is more conducive to male participation. This is the effect of past discrimination. Article 4 of CEDAW provides that temporary special measures or affirmative action and women centred development policy measures are legitimate means to ensure *de facto* equality for women.

CEDAW's definition of discrimination also provides a guide for assessing when the different treatment accorded to women is permissible. For example, protective measures like barring women from some forms of work could be construed as discrimination as these measures could work against women's interests in the long term and may nullify or impair the enjoyment of rights.

As General Recommendation 25 states, “*the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality*”. An example of acceptable differential treatment is the quota system in political participation where a certain percentage of seats in parliament or local government are reserved for women. This is seen as temporary affirmative action until such time when larger numbers of women are able to stand for election due to increased capability and other factors enabling such participation.

The third important principle under CEDAW (and international treaty law) is the principle of the **obligation of the state** to implement the treaty and thus give effect to the treaty at the domestic level. An international human rights treaty creates obligations on States

parties to the treaty that are binding. States enter into this obligation through the legal process of ratification and hence are obliged to implement the provisions of the treaty according to its spirit. Article 26 of the Vienna Convention on the Law of Treaties (1969), which sets the parameters of international treaty law, states: *“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”*. Article 27 states: *“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”*.

In other words, a State must modify its domestic legal system or take any other steps necessary so that it is in compliance with the principles of the treaty it has ratified – internal law cannot be an excuse for non-compliance. By ratifying CEDAW, a State is offering itself to scrutiny on the basis of standards set forth in the Convention.

The question then arises – who is the State Party that must comply with the terms of the treaty? According to CEDAW, the State comprises all its constituent units – legislative, judicial and executive.

In general, under CEDAW the State is obligated to ensure practical realisation of rights through:

- Incorporating the principle of equality of men and women in their legal and administrative systems, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women;
- Establishing tribunals and other public institutions to ensure the effective protection of women against discrimination;
- Ensuring elimination of all acts of discrimination against women by persons,

organisations or enterprises; and

- Accelerating de facto equality by implementing affirmative action (Article 4), including Temporary Special Measures to address structural discrimination.

More specifically, Articles 2-4 spell out the broad State obligations, while Articles 5-16 provide the substance and context in which the principle of State obligation must be applied.

Overview of procedures and monitoring mechanisms for promotion of State obligation

As we have seen, ratification of an international human rights treaty creates legally binding obligations on States parties to the treaty. They are obliged to implement the provisions of the treaty according to its spirit. In reality, however, few States do this automatically – supremacy of national law is considered operative in many countries. Treaty bodies have no direct powers of enforcement, but its monitoring mechanisms and procedures scrutinise compliance and give direction. They set standards on women’s human rights on a continuing basis; monitor implementation by individual States; and require action by States on their directives. The monitoring mechanisms of CEDAW consist of the CEDAW Committee, the Reporting Process, and the Optional Protocol to CEDAW.

Members of the CEDAW Committee, which comprises 23 experts from various regions who are nominated by their respective governments and serve in their personal capacity, are elected for four-year terms. The Reporting Process consists of ratification; preparation of State party report; submission of report; the pre-session; and the CEDAW session itself (Constructive Dialogue and

Concluding Comments). Individual States are required to report one year after ratification, then once every four years thereafter. The CEDAW Committee also calls for alternative information from a range of other stakeholders – NGOs (in the form of shadow reports); United Nations (UN) agencies; national human rights mechanisms; other treaty bodies; special mechanisms of the UN Human Rights Council (Special Rapporteurs), etc. The Concluding Comments that are issued to reporting countries at the end of the reporting process include observations of non-compliance and directives for compliance based on interpretation of principles.

The Optional Protocol to CEDAW is another means of monitoring compliance, although it requires separate ratification by States parties to CEDAW. The Optional Protocol allows the Committee to conduct inquiries and provides for the filing of individual complaints after exhaustion of domestic remedies.

The Committee has generated several interpretative tools that constantly evolve standards and define action to be taken. These include the Concluding Comments, mentioned above, and General Recommendations that are authoritative interpretations of the Convention and means for the CEDAW Committee to address contemporary issues, develop standards and provide guidance for implementation. There are twenty-five general recommendations adopted to date addressing both technical aspects of reporting to the Committee as well as substantive issues such as violence against women (GR 19), equality in marriage and family relations (GR 21), women and political and public life (GR 23), women and health (GR 24) and temporary special measures (GR 25).

CEDAW at the national level: A broad overview of the status of treaty law at the domestic level with illustrative examples

At one level, ratification of CEDAW imposes obligations on the States parties involved. At another, this treaty is an advocacy tool that can be used to interpret equality, as well as to implement and evaluate action. Doing so leads to the mobilisation and development of informed and committed constituencies of government functionaries as well as of women at all levels, local and global.

That being said, there are several operative factors at the national level that have to be taken on board:

- Treaty Bodies have no direct powers of enforcement.
- States that ratify the Convention are obligated to enforce. However, there are no ready institutional mechanisms for operationalising treaties.
- Despite the principles of State obligation under international law, the Constitution and customary and religious laws are deemed supreme in many countries.
- Most countries have very little jurisprudence citing CEDAW.
- The capacity of stakeholders – government, judiciary, institutional mechanisms, NGOs/civil society – varies greatly among countries, and is generally low.
- Incorporation and enforcement of the treaty is dependent on political will – few Governments are proactive.
- Political action has to be generated through public demand and advocacy.

National constitutions, laws and government policies

When women's human rights are included in a national constitution, they become part of a country's baseline for rights protection and Government obligations. The ways in which constitutions incorporate women's human rights vary a great deal from country to country. In some countries, international treaties are "*self-executing*" i.e. there is a constitutional provision stating that international treaties once ratified are deemed the law of the land. In others, CEDAW principles have been integrated into new constitutions through amendments and enabling legislation. CEDAW principles can also gain 'constitutional' status in a less direct fashion, when the courts are persuaded to apply the principles of CEDAW in specific cases, thus giving existing constitutional guarantees of equality and non-discrimination a more detailed and concrete meaning.

In some cases, CEDAW has been incorporated into specific national and state laws. There are also instances of development of policy guidelines based on treaty principles, even where there is no explicit statutory or constitutional mandate. Hence CEDAW has been applied in a variety of ways and at different levels among countries that have ratified the Convention. Nepal for example has a constitutional provision stating that international law automatically supersedes national law upon ratification. In Cambodia, Laos, Philippines, Indonesia and Vietnam, treaty law is supposedly recognised as part of domestic law, but there is no clear statement that it is self-executing, or clarity on what prevails if domestic law conflicts with international law. A prime example of incorporation of CEDAW principles at the time of drafting a

constitution is South Africa. Some examples of countries that have incorporated CEDAW while re-drafting a constitution are Colombia, Uganda and Brazil. Several countries (India, Pakistan, Malaysia, Singapore, and Thailand) follow the British principle of Parliamentary supremacy in enacting laws, and in these countries international treaties have no legal status until directly transformed through enabling legislation. This is often called a "dualist" regime (as opposed to a "monist" regime in which international treaties are self-executing once ratified), in which international and national laws are seen as two separate systems that must be explicitly reconciled through such enabling legislation. Few countries have passed enabling legislation. Despite this, precedents in incorporation of CEDAW have been set through filing of test cases. Even though according to principles of dualism, the application of international law is limited by the necessity for enabling legislation, national courts in several countries have in practice progressively sought the assistance of international human rights laws and standards as interpretive guides.

Despite some cynicism about the Convention, especially in countries where the principles of the Convention have not been incorporated into domestic legislation, there are many examples of constitutions and domestic laws being reformed on the basis of the principles of the Convention. Discriminatory laws have been challenged; the Convention has been used to interpret ambivalent provisions of the law or where the law is silent to confer rights on women. Development policies have also been formulated using the framework of the Convention.

Extra-legal strategies for making CEDAW operative at the ground level

Laws can remain paper laws with little real

impact on women's lives unless actively used to claim rights. Some of the most significant constitutional gains have been won in countries where there has been a broader national move for constitutional renewal, a recent ratification of CEDAW and/or an interest from women's NGOs in using CEDAW as an advocacy tool. Realising that the impact of law goes beyond enactment to implementation at ground level, women's NGOs have done important work since CEDAW was opened for ratification in 1979 to make sure that its provisions are incorporated into their States' constitutions.

There often does not seem to be any discrimination against women since the protection of women's rights is codified in many of the laws such as the family code, penal and criminal procedure codes, labour law, etc., and these laws appear gender-neutral on their face. But these laws do not always benefit women because of cultural attitudes, inappropriate rules of implementation and bias against women, inefficiency or corruption within the legal system, or the impunity with which the law is flouted in some countries when it comes to women's rights. It is important that public education accompany the effort to pass or amend legislation. Women must be informed about new legal entitlements that have been created, before they can be expected to claim them. Government bureaucracies, local administrators and police departments must also recognise and respect these new entitlements in order for these claims to be enforced.

As almost all the illustrative examples above have shown, popular education has to be part of any litigation strategy. Good arguments can persuade a court to rule in favour of women's human rights, but decisions still

have to be implemented. If enough work has not been done to inform and educate the Government and the general public, there is a real possibility that a court's decision will not be properly enforced or even that the decision might be overturned by new legislation.

For there to be progressive changes in law and policy and for them to have a real and practical impact on the daily lives of women, advocacy and action must be based on:

- A real, concrete and substantive vision of women's equality.
- Building constituencies by showing the effects of discrimination on women's lives.
- Political organising and strategising.
- Training of key players/catalysts.
- Wide dissemination of information through various means – public hearings, media, policy dialogues, judicial colloquiums, street plays, etc.
- Mass mobilisation of public support.
- Engagement at the grassroots level.
- A combination of adversarial and co-operative approaches.
- Advocacy, sensitisation, education of all stakeholders – public, constituencies of women, government, judiciary, media.
- Development of jurisprudence through progressive interpretation and application of CEDAW.
- Campaigns for legal reform by women's groups.
- Political campaigns that turn issues of women's human rights into demands for political reform – landmark cases are a handle for doing this.

Conclusion

In conclusion, this paper merely gives an overview of CEDAW and how it can be used across the world to steadily build up progressive laws and jurisprudence around its principles. For this law and jurisprudence to change women's lives in a significant way, extra-judicial strategies such as public education, mobilising grassroots support, dialogue with government and judiciary, etc., continue to be necessary to strengthen the demands for mechanisms for implementation. It is a continuing and challenging process as what is being attempting here is the reversal of centuries of discrimination!

Selected References

1. *BRINGING EQUALITY HOME: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women*, edited by Ilana Landsberg-Lewis, United Nations Development Fund For Women (UNIFEM)
2. "Impact of the Convention at the Domestic Level", paper presented by Shanthi Dairiam Director, IWRAP Asia Pacific, at the seminar "CEDAW AT 25: ARE WE MOVING FORWARD" on the occasion of the twenty-fifth anniversary of the adoption Convention on the Elimination of All Forms of Discrimination against Women, 13 October 2004, United Nations Headquarters, New York.
3. "Addressing Intersectional Discrimination with Temporary Special Measures", IWRAP Asia Pacific Occasional Paper Series No. 8.
4. "The Status of CEDAW Implementation in the ASEAN Countries and Selected Muslim Countries", paper presented by Shanthi Dairiam, IWRAP Asia Pacific, at the Roundtable Discussion on Rights and Obligations Under CEDAW organised by the Human Rights Commission of Malaysia (SUHAKAM) on 17 March 2003, Kuala Lumpur, Malaysia.
5. Deepika Udagama, Research Paper on Sri Lanka, in *The Vertical Application of Human Rights: Incorporation of international human rights standards in the domestic legal framework (Treaty Incorporation Research Project)*, edited by Andrew Byrnes, upcoming publication to be published by IWRAP Asia Pacific.

Endnote

- 1 Further information available online at, <http://www.un.org/womenwatch/daw/cedaw/states.htm>